

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

original
with affidavit
of mailing

74-1239
13

To be submitted

Page 5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GINO FANTUZZI and
SERGIO JARAMILLO,

Appellants,

DOCKET NO. 74-1239

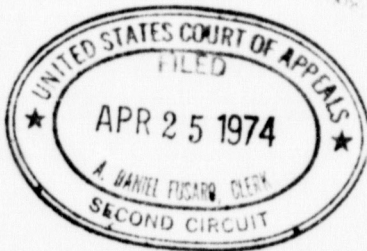
- against -

UNITED STATES OF AMERICA,

Appellee.

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BRIEF FOR THE APPELLEE



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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	3
ARGUMENT--The District Court properly denied appellants' motion to vacate sentence without an evidentiary hearing	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

<u>Dalli v. United States</u> , F.2d (2d. Cir.), Slip Op. 1391, decided January 14, 1974	7
<u>Korenfeld v. United States</u> , 451 F.2d 750 (2d. Cir. 1971)	7
<u>Meyers v. United States</u> , 446 F.2d 37 (2d. Cir. 1971)	7
<u>Panico v. United States</u> , 412 F.2d 1151 (2d Cir. 1969), cert. denied, 397 U.S. 921 (1970)	7
<u>Raines v. United States</u> , 423 F.2d 526 (4th Cir. 1970)	5
<u>Sanders v. United States</u> , 373 U.S. 1 (1972)	6
<u>Tomaiolo v. United States</u> , 378 F.2d 26 (2d Cir.), cert. denied, 389 U.S. 886 (1967)	7
<u>United States v. Fantuzzi</u> , 463 F.2d 683 (2d Cir. 1972)	2
<u>United States v. Welton</u> , 439 F.2d 824 (2d Cir.) cert. denied, 404 U.S. 859 (1971)	6

STATUTES

PAGE

18 U.S.C. §2510 <u>et. seq.</u>	3, 7
47 U.S.C. §605	2, 7

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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SERGIO JARAMILLO,	:
	:
<u>Appellants,</u>	:
	:
- <u>against</u> -	:
	:
UNITED STATES OF AMERICA,	:
	:
<u>Appellee,</u>	:
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PRELIMINARY STATEMENT

This is an appeal from an order of the Honorable Orrin G. Judd, United States District Judge for the Eastern District of New York, dated January 8, 1974, denying without a hearing, a joint pro se motion by appellants, Gino Fantuzzi and Sergio Luis Jaramillo, made pursuant to Title 28, United States Code, Section 2255, to set aside appellants' convictions.

On January 25, 1971, at the conclusion of a non-jury trial before Judge Judd, appellants were found guilty of knowingly, wilfully and unlawfully, conspiring to import into the United States cocaine, and to buy, sell, conceal and facilitate the transportation, concealment and sale of cocaine, knowing the same to have been illegally imported. (18 U.S.C. §§173 and 174) Appellants were subsequently sentenced to fifteen years imprisonment on April 16, 1971.

The judgment of the District Court was affirmed on appeal by decision of July 10, 1972. United States v. Fantuzzi, 463 F.2d 683 (2d. Cir. 1972).

On the instant appeal, Fantuzzi and Jaramillo maintain: (1) that the failure of the Government to respond to their initial motion to vacate sentence required the District Court to accept the allegations contained therein as true and to hold an evidentiary hearing; and (2) that the wiretap evidence used to secure their convictions was obtained in violation of Title 47, United States Code, Section 605.

STATEMENT OF THE CASE

Appellants, and three co-defendants, Carmen Lopez, Claudine Lieros and James Christian, were convicted of violating 21 U.S.C., §§173 and 174 at the conclusion of a non-jury trial. The one count indictment charged that appellants, the three co-defendants and two fugitive co-defendants, Pedro Rojas and Manuel Villaseca, conspired to buy, sell, conceal and facilitate the transportation, concealment and sale of cocaine knowing the same to have been illegally imported.

In addition to the testimony of various witnesses, the Government's evidence at trial consisted of conversations of conspiracy members recorded by a wiretap on co-defendant Carmen Lopez's telephone. The wiretap order issued on May 23, 1970 by Federal District Court Judge Inzer Wyatt of the Southern District of New York was obtained in strict compliance with the requirements of federal law governing electronic surveillance as embodied in Title 18, United States Code, Section 2510, et seq.

Prior to trial, the Government made available to appellants' attorneys, the wiretap order and supporting papers, transcripts of the recorded conversations and the tapes themselves. Appellants joined in a pre-trial motion to suppress the wiretap evidence; the motion was argued and denied.

The legality of the wiretap order was argued a second time on appeal. This Court affirmed appellants' convictions holding that there was probable cause for issuance of the wiretap order and sufficient evidence to convict appellants.

Appellants raised the wiretap issue for a third time in their motion to vacate sentence and the instant appeal from denial of that motion.*

In a Memorandum and Order of January 8, 1974, Judge Judd denied appellants' motion, finding no merit to their allegations.

*In their original motion, appellants also alleged ineffective assistance of counsel and impropriety in permitting Spanish to English translations of the tapes by Government interpreters. These issues were not reargued on appeal.

ARGUMENT

THE DISTRICT COURT PROPERLY
DENIED APPELLANTS' MOTION TO
VACATE SENTENCE WITHOUT AN
EVIDENTIARY HEARING.

In their first three questions presented on appeal, appellants make the same argument on the same procedural point; namely, that failure of the Government to file a response to appellants' motion to vacate sentence required Judge Judd to accept the truth of their allegations and to hold a full scale evidentiary hearing.* To the contrary, under the provisions of 28 U.S.C. §2255, it is proper for the District Court to summarily dismiss a motion to vacate sentence without an evidentiary hearing or even the requirement for a responsive pleading from the Government where as is the case with appellants' motion, no factual issues are raised and the motion is on its face frivolous. Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970).

Appellants' motion contains nothing more than unsupported and unsupportable legal conclusions—bare allegations of ineffective assistance of counsel and supposed violation of Fourth and Fifth Amendment rights through use of wiretap evidence and Government interpreters. This lack of supporting factual material alone would have been sufficient grounds without any

*Due to an apparent clerical error, the Government never received notice of argument on appellants' motion; consequently, no responsive pleading was filed. Although Judge Judd obviously sought guidance from the Government with respect to appellants' allegations, a response by the Government was not a necessary prerequisite to Judge Judd's decision that an evidentiary hearing was not required and there was no merit to appellants' motion.

further evaluation, for the Court to deny appellants' motion. Sanders v. United States, 373 U.S. 1, 19 (1972); Korenfeld v. United States, 451 F.2d 750, 751 (2d. Cir. 1971); United States v. Welton, 439 F.2d 824, 826 (2d. Cir.), cert. denied, 404 U.S. 859 (1971).

The District Court, however, rather than rejecting appellants' motion out of hand, reviewed the record to determine if there was any basis for appellants' allegations. After such a review, Judge Judd properly found: (1) appellants were represented by experienced counsel both at trial and on appeal; (2) they were provided with the tapes and their attorney brought a Spanish interpreter to Court and was afforded the opportunity to cross-examine the Government interpreter; and (3) the issue of the wiretap order had already been litigated and decided adversely to appellants both pre-trial and on direct appeal from their convictions.

Judge Judd properly concluded that there was no basis for an evidentiary hearing and no merit to appellants' motion.

Appellants raise only one substantive point on appeal.* They attack as they did unsuccessfully both by pre-trial motion and on direct appeal, the legality of the wiretap order and the introduction into evidence at trial of the information derived therefrom. Rather than present any factual support for their claims or even suggest what specific factors they consider to

*Appellants apparently concede the Judge's decision as to the lack of merit of the other claims made in their original motion of ineffective assistance of counsel and prejudicial English translations of their wiretapped conversations, since they fail to reargue these points on this appeal.

make the wiretap in question legally suspect, they launch an attack on the evils of wiretaps in general, predicated their argument in large measure on an analysis of 47 U.S.C. §605.

First of all, the legality of the wiretap order was litigated both pre-trial and again on appeal; in both instances the question was decided adversely to appellants. It is well-settled that once a matter has been decided adversely to a defendant on direct appeal, it cannot be relitigated in a post-conviction collateral attack. Meyers v. United States, 446 F.2d 37, 38 (2d. Cir. 1971); Panico v. United States, 412 F.2d 1151, 1154 (2d. Cir. 1969), cert. denied, 397 U.S. 921 (1970); Tomaiolo v. United States, 378 F.2d 26, 28 (2d. Cir.) cert. denied, 389 U.S. 886 (1967). See also, Dalli v. United States, ___ F.2d ___, Slip Op. 1391, decided January 14, 1974.

Secondly, even if consideration is given to appellants' argument on the wiretap order, their argument fails substantively. The main thrust of their argument is that the wiretap evidence was obtained in violation of the Federal Communications Act of 1934, specifically, 47 U.S.C. §605. Expressly excepted from prohibitions of Section 605 (by Amendment of 1968), however, is electronic surveillance carried out pursuant to Chapter 119 of Title 18 (18 U.S.C. §2510 et seq.). The wiretap order in question was obtained under the provisions of, and in full compliance with, Chapter 119 of Title 18. Appellants' argument on this point is without merit.

CONCLUSION

The order denying appellants' motion should be affirmed.

Respectfully submitted,

Dated: Brooklyn, New York
April 23, 1974

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Assistant United States Attorneys,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 23rd day of April 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~2~~ two copies of brief for the appellee

of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper by certified mail return receipt requested directed to the person hereinafter named, at the place and address stated below:

Sergio Jaramillo Gino Fantuzzi

c/o U.S. Penitentiary c/o U.S. Penitentiary

Atlanta, Georgia 30315 Atlanta, Georgia 30315

Sworn to before me this

23rd day of April 1974

IRENE B. COHEN
Notary Public, State of New York
No. 24-0632965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

DEBORAH J. AMUNDSEN